No. 03-561

Supreme Court, U.S.
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In The

Supreme Court of the United States

UNITED STATES OF AMERICA, EX REL.
JAMES B. KINNEY,

Petitioner,

v.

REBECCA STOLTZ; KELLY SPRATT;
GERALDINE PETERSON; AND JENNIFER PETERSON,

Respondents.

On Petition For Writ Of Certiorari
To The Eighth Circuit Court Of Appeals

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant Petitioner's writ of certiorari to review perceived differences in the interpretation of the public disclosure bar identified in 31 U.S.C. § 3730(e)(4) when Petitioner is not an original source as defined by 31 U.S.C. § 3730(e)(4)(B)?

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INTRODUCTION

This case, with its peculiar facts and its unique procedural history, presents no issue meriting Supreme Court review. The decision below was both unremarkable and highly fact-sensitive. The single most important fact – a fact that Petitioner has intentionally ignored, but that the Eighth Circuit Court of Appeals and the District Court for the District of Minnesota did not – is that the allegations in this case against Respondents are based entirely upon discovery taken in a different case that raised different allegations against different defendants. Absent that discovery, Petitioner had no basis in law or fact to commence this action. Simply stated, Petitioner is not an original source. Because this lawsuit is purely parasitic, it is an unsuitable vehicle for resolving any perceived differences among the circuits as to the interpretation of the public disclosure jurisdictional bar to the False Claims Act. Therefore, Petitioner's request to have this Court review the decision of the Eighth Circuit Court of Appeals should be denied.

RESPONDENTS' COUNTER-STATEMENT OF THE CASE

I. The *Kinney I* Lawsuit.

In 1997, Petitioner commenced his original lawsuit, *Kinney v. Hennepin County Medical Center & Hennepin Faculty Associates*, No. CIV 97-1680 (RHK/JMM) ("*Kinney I*"), suing two separate entities – Hennepin County Medical Center ("HCMC") and Hennepin Faculty Associates ("HFA"). HCMC is the county-owned hospital; HFA is a

private corporation that employs the doctors who staff the hospital.

In *Kinney I,* Petitioner alleged that HCMC and HFA conspired to defraud the United States by having HFA physicians falsely certify medical necessity on ambulance run sheets. (Appellant's App. in Record at 196, ¶ 26.) Petitioner alleged that HFA physicians signed *all* ambulance run sheets, falsely certifying the medical necessity of medically unnecessary ambulance transports so that HCMC could then bill Medicare for those transports. (*Id.* at 191-96, ¶¶ 11, 19, 20, 21, 22, 24, 25 and 26.) HFA allegedly undertook this practice at HCMC's insistence because the presence of physician certification was what allowed HCMC to bill the transports to Medicare. This "scheme" allowed HCMC to obtain reimbursement for non-billable transports, thereby augmenting HCMC's revenues. Because HFA was paid for examining and treating any person transported to HCMC, the scheme also allegedly augmented HFA's revenues. (*Id.* at 190, ¶ 8.)

The district court, finding that HCMC was not a "person" under the FCA, dismissed HCMC with prejudice, and entered judgment per Rule 54(b) of the Federal Rules of Civil Procedure. *United States ex rel. Kinney v. Hennepin Cty. Med. Ctr. & Hennepin Faculty Assoc.*, No. CIV 97-1680 (RHK/JMM), 2001 WL 930780 (D. Minn. Jan. 22, 2001). Petitioner did not appeal that judgment. Instead, Petitioner proceeded with his case against HFA. During discovery that was taken after HCMC was dismissed, Petitioner deposed eight HCMC employees, including three of the four individually-named defendants in this action. From these depositions Petitioner learned that, contrary to his earlier allegations, HFA physicians *did not* regularly sign ambulance run sheets and that physician certification *had absolutely no bearing* on whether a

particular ambulance run was ever billed to, or paid by, Medicare. Petitioner further learned that all ambulance transports were automatically assigned a HCPCS revenue code and a billing charge and were then electronically billed to Medicare.[1] The depositions of the individual HCMC employees also revealed the role these individuals played in this automated coding and billing process. (*See* Pet'r App. at 33-36.) It is this information that later became the basis for the current lawsuit.

At the close of discovery in *Kinney I*, the district court granted summary judgment to HFA finding that HFA did not cause the submission of any alleged false claims to the Government because the physician's certifications were unrelated to any reimbursement. *United States ex rel. Kinney v. Hennepin County Med. Ctr. & Hennepin Faculty Assoc.*, No. CIV 97-1680 (RHK/JMM), 2001 WL 964011 (D. Minn. Aug. 22, 2001). Final judgment was entered on August 22, 2001. *Id.* Petitioner did not appeal that judgment either.

II. The *Kinney II* Lawsuit.

While HFA's motion for summary judgment was pending, Petitioner commenced the current action ("*Kinney II*"). (The United States, as it had in *Kinney I*, declined intervention.) In *Kinney II*, Petitioner alleged an entirely different fraud scheme against entirely new defendants. Whereas in *Kinney I* the alleged fraud consisted of HFA's uniform practice of falsely certifying

[1] The HCPCS codes were derived from the American Medical Association's Current Procedures Terminology Manual and Health Care Providers Code System.

ambulance run sheets, the alleged fraud in *Kinney II* consisted of electronically upcoding the severity of patients' conditions and the complexity of the treatment they received.

Not only were the allegations of fraud in *Kinney II* distinct from those in *Kinney I*, so too were the defendants. In *Kinney II*, Petitioner sued Respondents – four individual HCMC employees ostensibly in their individual capacity.[2] (*See* Appellant's App. in Record at 737-47.) He did not name HFA, its physicians, or HCMC. In Count I, Petitioner alleged that these individuals had violated the FCA by creating and submitting the upcoded electronic claims; in Count II, he alleged that Stoltz presented false claims by recklessly disregarding the *absence* of physician certification on the underlying ambulance run sheets. (*See id.*)

On October 24, 2001, Respondents moved to dismiss the claim, arguing that, because it was based on information publicly disclosed in *Kinney I* of which Petitioner was not an original source, the district court lacked subject matter jurisdiction under 31 U.S.C. § 3730(e)(4). Alternatively, the defendants argued that, if *Kinney II* was "based upon" his original allegations in *Kinney I*, then *Kinney II* was barred by *res judicata*. The district court dismissed the *Kinney II* Complaint finding that it was based on publicly disclosed allegations of which Petitioner was not an "original source," and therefore that the court lacked

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[2] Rebecca Stoltz is the Billing Manager for HCMC; Jennifer Peterson is HCMC's former Director of Emergency Medical Services; Geraldine Peterson is the former Manager of Ambulance Services; Kelly Spratt subsequently held that position. (Appellant's App. in Record at 738, ¶¶ 4-7.)

subject matter jurisdiction under 31 U.S.C. § 3730(e)(4).[3] (Pet'r App. at 18-24.)

Petitioner appealed the dismissal to the Eighth Circuit, which affirmed, noting:

> While Kinney may well have had direct knowledge of the fact that some patients transported by ambulance were not eligible for such transport under Medicare, there is no evidence in the record that he had direct knowledge of [Respondents'] alleged wrongdoings. Kinney alleged in *Kinney I* that the doctors were responsible for the fraud. He made no mention of [Respondents], and there is no evidence in the *Kinney I* record that he was aware of the role [these individuals played] until after discovery. If Kinney had possessed direct knowledge of the asserted fraud in *Kinney II* he was obligated to identify them in his initial complaint. We agree with the district court that Kinney was not the original source of the allegations on which *Kinney II* is based; thus the district court lacked jurisdiction pursuant to 31 U.S.C. § 3730(e)(4)(A).

(*Id.* at 7-8 (internal citations and quotations omitted).)

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[3] On or about November 27, 2001, while the Motion to Dismiss *Kinney II* was pending, Petitioner served an "Amended Complaint," in which he sought to add Hennepin County as a named defendant, claiming that the County's statutory indemnification of its employees made it a "person," subject to suit under the False Claims Act. The district court dismissed this supplemental complaint. (Pet'r App. at 25.) Shortly thereafter, Petitioner commenced a third lawsuit naming as defendants the County of Hennepin and the United States of America. This Complaint was voluntarily dismissed after the County filed a motion to dismiss it.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED BY THE PETITIONER IS NOT FAIRLY RAISED BY THIS CASE.

The False Claims Act jurisdictionally bars an action based upon publicly disclosed information unless an original source of the information commences the action. 31 U.S.C. § 3730(e)(4)(A). An original source is an individual "who has direct and independent knowledge of the information on which the allegations are based. . . . " 31 U.S.C. § 3730(e)(4)(B). Petitioner argues that certain phrases, including "information," "allegations" and "based upon," have received varying interpretations among the circuits and that this case illuminates those differences. Though there are some differences among the circuits as to the precise meaning of Section 3730(e)(4), this case does not raise those issues and provides no basis for resolving them. Petitioner's argument fails, because under any interpretation, *Kinney II* was properly dismissed. Wherever courts may draw the line, *Kinney II* was well beyond it.

A. This Case does not Implicate a Conflict Regarding the Interpretation of the Phrase "Information on which the Allegations are Based" in Section 3730(e)(4)(B) of the False Claims Act.

Petitioner argues that the phrase "information on which the allegations are based" may refer either to the information upon which the allegations in the public disclosure are based or the information on which the allegations of fraud in the complaint are based. Admittedly, courts have differed as to which interpretation is

correct. Five circuits hold that it refers to information on which the publicly disclosed allegations are based.[4] In contrast, four circuits have construed the phrase to refer to the allegations contained in the *qui tam* complaint.[5]

Petitioner argues that the difference in interpretations affects the outcome in many cases and particularly his own. Petitioner demonstrates this effect by engaging in sophistry. Conceding that he is not an original source under the latter view, Petitioner contends that he is an original source of information upon which the allegations in the public disclosure are based. He then defines the relevant "public disclosure" as broadly as possible, claiming that the "public disclosure" is the general allegation that HCMC obtained reimbursement for non-reimbursable transports. Petitioner thereby seeks to entice review to resolve this "critical" split of authority among the circuits.

What Petitioner fails to discuss is that under either test, the "information on which the allegations are based" must relate to the *present* lawsuit – the information must

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[4] *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 336 F.3d 346, 354-55 (5th Cir. 2003); *Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1048 (8th Cir. 2002); *United States ex rel. Grayson v. Advanced Mgmt. Tech. Inc.*, 221 F.3d 580, 583 (4th Cir. 2000); *United States ex rel. McKenzie v. Bell-South Telecomm., Inc.*, 123 F.3d 935, 943 (6th Cir. 1997); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997).

[5] *United States v. New York Med. Coll.*, 252 F.3d 118, 121 (2d Cir. 2001); *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999); *United States ex rel. Mistick PBT v. Housing Auth. of the City of Pittsburgh*, 186 F.3d 376, 388-89 (3d Cir. 1999); *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407, 411 (9th Cir. 1993).

either relate to the allegations in the present complaint or to the public disclosure on which that complaint is based. Whether the information relates to the allegations in the complaint or the allegations in the public disclosure on which the complaint is based makes no difference in this case, as Petitioner is an original source of neither.

Petitioner's problem lies not in the definition of the phrase "the information on which the allegations are based" but upon his definition of the relevant "public disclosure." Petitioner erroneously claims that the relevant "public disclosure" includes all allegations in both the *Kinney I* and *Kinney II* complaints and asserts that as long as he is an original source of any of that information, *Kinney II* may proceed. However, the relevant "public disclosure" is expressly linked to the action at issue – here *Kinney II* and not *Kinney I.* This in turn raises the question of what is the public disclosure that *Kinney II* is based upon. Plaintiff does not and cannot contend that he had any direct or independent knowledge of the public disclosure at issue in *Kinney II* – Respondents' alleged wrongdoings. Accordingly, his claim is barred.

Petitioner attempts to evade this result by arguing that the broad allegation – that HCMC allegedly obtained reimbursement for transports that were not reimbursable – is sufficient to confer original source status as to the particularized allegations in *Kinney II.* This assertion is tantamount to an allegation that "fraud was committed." By reducing the allegations in *Kinney I* and *II* to their lowest common denominator – that HCMC received Medicare reimbursement for non-reimbursable transports – Petitioner would gut the False Claims Act's public disclosure bar. Petitioner's argument overlooks the fact that *Kinney II* is ostensibly a new claim against new

defendants.[6] As it relates to Respondents, the Eighth Circuit's analysis was exactly correct: " . . . there is no evidence in the *Kinney I* record that he was aware of the role [Respondents played] until after discovery." (Pet'r App. at 8.)

Petitioner relies heavily upon the Eighth Circuit's decision in *Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032 (8th Cir. 2002) to support his argument. Ironically, that case supports the opposite position. The defendants in that case argued that the allegations in the *qui tam* complaint were publicly disclosed through a 1991 administrative audit. The 1991 audit had revealed that the defendants billed for anesthetists' services where the anesthetist and anesthesiologist were both working on the same case. The defendants argued that this public disclosure barred jurisdiction. However, the Eighth Circuit found that the audit revealed practices *other than* those alleged as fraudulent in the *qui tam* action. Specifically, the audit concluded that the anesthesiologists *were performing* cases in which they were not continuously involved. In contrast, the *qui tam* action alleged that the anesthesiologists *were not performing* the cases at all. Thus, because the audit did not reveal what the Association contended was the fraudulent transaction (*i.e.*, that the anesthesiologists were not performing the cases they billed for), the Eighth Circuit determined that the audit was not a public disclosure of the allegations in the *qui tam* action.

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[6] And of course, if it is not a new claim against new defendants then the action is barred by *res judicata*.

The same is true here. The allegations of fraud in *Kinney II* are different from the allegations of fraud in *Kinney I*. *Kinney II* is based upon allegations that these individual Respondents defrauded the Government by upcoding services; it is not based on the allegation that HFA physicians were falsely certifying ambulance runs. Accordingly, the Eighth Circuit in this case did not abandon *Minnesota Ass'n of Nurse Anesthetists,* it followed it. Petitioner has not contended that he is an original source of information relating to Respondents, which is the information upon which both the allegations in the public disclosure at issue in *Kinney II* and the *Kinney II* Complaint are based. His claim is therefore barred.

B. This Case does not Implicate a Conflict as to the Interpretation of the "Based Upon" Phrase in Section 3730(e)(4)(A) of the False Claims Act.

The public disclosure bar of the False Claims Act provides that "no court shall have jurisdiction over an action . . . based upon the public disclosure of allegations or transactions . . . unless . . . the [plaintiff] is an original source of the information." 31 U.S.C. § 3730(e)(4)(A). Petitioner argues that the circuits are also divided as to the interpretation of the phrase "based upon" as used in Section 3730(e)(4)(A). Much of Petitioner's argument is a rehash of the argument discussed above. To that extent, Petitioner raises no issue suitable for review.

Petitioner also notes that the circuits have differed as to the definition of "based upon." Specifically, some circuits

define "based upon" as meaning "derived from" the public disclosure[7] while others define it as meaning "substantially similar to" the public disclosure.[8] Under either definition, however, Petitioner's case was properly dismissed. It is undisputed that the allegations in *Kinney II* were both derived from and the same as the discovery taken and disclosed in *Kinney I*. It is likewise undisputed that Petitioner had no direct or independent knowledge of this information. To the extent that the circuits differ as to the meaning of the phrase "based upon," this case does not fairly raise that issue.

C. This Case does not Implicate a Conflict Concerning the Quantum of "Direct and Independent" Knowledge a Relator Must Possess to be an Original Source under Section 3730(e)(4)(B) of the False Claims Act.

Petitioner also argues that the decision below conflicts with Eighth Circuit and other precedent regarding the

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[7] *See United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994); *United States v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999).

[8] *See Minnesota Ass'n of Nurse Anesthetists*, 276 F.3d at 1044-47; *United States ex rel. Mistick PBT*, 186 F.3d at 385-88; *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1017 (7th Cir. 1999); *United States ex rel. Biddle v. Bd. of Trustees of the Leland Stanford, Jr. Univ.*, 161 F.3d 533, 536-40 (9th Cir. 1998); *United States ex rel. McKenzie*, 123 F.3d at 940; *United States ex rel. Findley*, 105 F.3d at 682-85; *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 567 (11th Cir. 1994); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552-53 (10th Cir. 1992); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992); *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 504 (7th Cir. 1989).

quantum of information a relator must possess to qualify as an original source. This argument fails for at least two reasons: (1) Petitioner has identified no split of authority on this issue and (2) this case does not raise the issue in any event.

Though few decisions have attempted to quantify the amount of information a relator must possess to qualify as an original source, the decisions that have have not evinced a split of legal authority on this point. Rather, the circuits have articulated differing formulations tailored to the particular facts at hand to measure whether the relator before them possessed sufficient knowledge to be an original source. Thus, in *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994) the court focused on whether the relator knew either the false state of facts or the true ones. In *United States ex rel. Stinson, Lyons, Gerlin Bustamante P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991), the court focused on the fact that the relator did not have direct and independent knowledge of *any information*, but only understood the legal significance of the information already publicly disclosed. In *Feingold v. Assoc. Ins. Co.*, No. 98 C 4392, 2001 WL 1155250 (N.D. Ill. Sept. 28, 2001), the court focused on the fact that relator had no knowledge relating to the particular defendant. Far from demonstrating a split of authority, Petitioner's argument ignores the unifying element in all these opinions: The relator must have direct and independent knowledge of some information regarding the particular fraud allegedly perpetrated by the particular defendant.

Petitioner contends that the Eighth Circuit disregarded *Minnesota Ass'n of Nurse Anesthetists* and *Springfield Terminal* by requiring him to have personal knowledge of all the essential elements of the fraud.

Petitioner misreads the decision below and the relevant precedent. First, the decision below did not require knowledge of all elements of the fraud; it required knowledge of some elements relating to the particular fraud by Respondents. Moreover, while precedent does not require the relator to have personal knowledge of each and every discrete piece of information supporting the allegations of fraud, it does require the relator to have direct knowledge of *some* essential element of the fraud transaction. *Minnesota Ass'n of Nurse Anesthetists*, 276 F.3d at 1050; *Springfield Terminal*, 14 F.3d at 657; *see also United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997) (relying on *Springfield Terminal* and finding that, although the relator had direct and independent knowledge of information in his complaint, he was not an original source because he did not have direct and independent knowledge of the publicly disclosed allegations of fraud); *United States ex rel. Stinson, Lyons, Gerlin Bustamante P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991) (relator need not have all relevant information but must possess some substantive information about the particular fraud alleged).

Here, however, Petitioner had *no* knowledge of *any* element of the allegedly fraudulent activity constituting the alleged False Claims Act violations in *Kinney II*. Petitioner had no knowledge of Respondents' activities until discovery in *Kinney I*. He was never involved in the process of unearthing important information about a false or fraudulent claim, and never observed the activities that allegedly constituted the fraud perpetuated by Respondents. Although Petitioner suspected that the Government was being defrauded, the only direct knowledge he had was his observation that some patients transported by

ambulance were not eligible for such transport under Medicare. His own knowledge provided no information of any allegedly fraudulent transactions involved in *Kinney II*.[9] Moreover, Petitioner's suspicion proved incorrect. Petitioner inferred – based on his direct knowledge – that HFA physicians were defrauding the Government by false certification. He discovered otherwise only through the depositions in *Kinney I*, when he learned that physician certification was irrelevant in the billing process. The key fact remains that Petitioner had no knowledge – direct or otherwise – that Respondents were involved in any alleged scheme to fraudulently upcode ambulance transports. Because *Kinney II* is consistent with established precedent in the Eighth Circuit and elsewhere, this Court should decline review.

D. This Case Presents no Issue Regarding the Purpose of the False Claims Act.

Finally, Petitioner urges Supreme Court review because the Eighth Circuit's decision is ostensibly incompatible with the language and legislative history of the

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[9] *See, e.g., United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1159 (2d Cir. 1993) (denying original source status to relator who possessed some background knowledge, but who was not the source of the core information underlying the *qui tam* complaint); *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1163 (10th Cir. 1999) (relator could not satisfy the "direct and independent knowledge" requirement where most of the core information came from a third party's investigation); *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1547-48 (10th Cir. 1996) (no direct and independent knowledge by a relator who alleged he instigated and directed scope of audit that publicly disclosed fraud because he did not actually perform the audit).

False Claims Act. Petitioner contends that the decision below requires a relator to have personal knowledge of all elements of the alleged fraud. Petitioner's argument is simply misguided. Not only does the decision not articulate such a test, this case is the paradigm of what Congress intended to prevent by the 1986 amendments. This lawsuit is purely parasitic. One of the primary purposes of the 1986 amendments was to eliminate parasitic claims. *See, e.g., United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1511 (8th Cir. 1994) (purpose of 1986 amendment was to promote private citizen involvement in exposing fraud against the government and preventing parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud). The Eighth Circuit's decision offends neither the language nor the legislative intent behind these amendments. To the contrary, it effectuates them and in doing so provides no reason for Supreme Court review.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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